

1 IN THE UNITED STATES BANKRUPTCY COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 IN RE: : CASE NO. 07-05871 (ESL)
4 RIDEL ALEGRE FERNANDEZ ROSADO : CHAPTER 7
5 :
6 Debtor :
7

8 ORDER

9 This case is before the court upon the “Debtor’s Request For Reconsideration Of Dismissal
10 Pursuant To FRBP 7055(c) & FRCP 55(c)” (the “Motion for Reconsideration”) filed by Ridel Alegre
11 Fernández Rosado (the “Debtor”) on June 1, 2009 (Docket No. 67), of the order entered in this case
12 on May 29, 2009 (Docket No. 60) in favor of Celedonio Corredera Pablo, Pablo López Baez, Emma
13 Teresa Benítez and Osiris Delgado (the “Creditors”), dismissing this case for the reasons stated in
14 Creditors’ motion to dismiss (Docket Nos. 55 and 56). On June 19, 2009, Creditors filed an
15 opposition to Debtor’s Motion for Reconsideration (Docket No. 69). For the reasons stated below
16 the Motion for Reconsideration is hereby granted.

17 *Fed. R. Civ. P. 59(e)*

18 A motion for reconsideration of an order or judgment is not recognized by the Federal Rules
19 of Civil Procedure. In re Pabon Rodriguez, 233 B.R. 212, 218 (Bankr. D.P.R. 1999) *aff’d*, 2001 WL
20 958803 (1st Cir. 2001) (citing Vank Skiver v. United States 952 F.2d 1241, 1243 (10th Cir. 1991)).
21 Federal courts treat such a motion as either a motion to alter or amend judgment under Fed. R. Civ.
22 P 59(e) or a motion for relief of judgment under Fed. R. Civ. P. 60(b). “These two rules are distinct;
23 they serve different purposes and produce different consequences. Which rule applies depends
24 essentially on the time a motion is served. If a motion is served within ten days of the rendition of
25 judgment, the motion ordinarily will fall under Rule 59(e). If the motion is served after that time, it
26 falls under Rule 60(b).” Id. In the instant case Plaintiff’s Motion for Reconsideration was filed three
27 (3) days after the order for which reconsideration is sought was entered. Therefore, the motion will
28 be treated as one filed under Fed. R. Civ. P. 59(e) made applicable here through Fed. R. Bank. P.

1 9023.

2 Fed. R. Civ. P. 59(e) authorizes the filing of a written motion to alter or amend a judgment
3 after its entry. The motion must demonstrate the “reason why the court should reconsider its prior
4 decision” and “must set forth facts or law of a strongly convincing nature” to induce the court to
5 reverse its earlier decision. Pabon Rodriguez, 233 B.R. at 218 (citations omitted). The movant “must
6 either clearly establish a manifest error of law or must present newly discovered evidence”. Id. The
7 party cannot use a Rule 59(e) motion to cure its own procedural failures or to introduce new evidence
8 or advance arguments that could and should have been presented originally to the court. Id.
9 Generally, when a party is made aware that a particular issue will be relevant to its case but fails to
10 produce readily available evidence pertaining to that issue, the party may not introduce that evidence
11 to support a Rule 59(e) motion. Id. Neither can the party use this motion to raise novel legal theories
12 that it had the ability to address in first instance. Id. The federal courts have consistently stated that
13 a motion for reconsideration of a previous order is an extraordinary remedy that must be used
14 sparingly because of interest in finality and conservation of scarce judicial resources. Id. In practice,
15 Fed. R. Civ. P. 59(e) motions are typically denied because of the narrow purposes for which they are
16 intended. Id.

17 *Plaintiffs’ Arguments & Discussion*

18 In the Motion for Reconsideration, Debtor presents four (4) arguments as to why the court
19 should reconsider the order granted by this court dismissing this case.

20 Debtor’s first argues that Creditors’ motion to dismiss required that all creditors and parties
21 in interest be served and noticed and that the debtor be served by summons. P.R. LBR 9014-1(b)
22 establishes that the, “[m]ovant must serve the motion by mail in the manner provided by Fed. R.
23 Bankr. P. 7004, unless another manner of service is ordered by the Court. Except for relief from stay
24 motions, no summons is required. Movant must file with the Clerk a certificate of service that
25 complies with LBR 9013-3.” P.R. LBR 9014-1(b). Thus, it is unequivocally clear that no summons
26 is required to serve a motion to dismiss upon a party. Debtor’s also brings forth the argument that the
27 motion to dismiss was not served nor noticed to all creditors and parties in interest. Creditors’ in their
28 opposition to the Motion for Reconsideration clarify that, “[i]n the case at hand, the Movants gave

1 electronic notice to Debtor's counsel, to the U.S. Trustee, to the Chapter 7 Trustee, and to all parties
2 who had filed a notice of appearance, except to Debtor and to Popular Auto, to whom notice was sent
3 via First Class mail postage pre-paid, even though by excusable mistake the Movants failed to state
4 so." (Opposition to Motion for Reconsideration, paragraph #8). This court finds that Creditors failure
5 to include that notice was sent to Popular Auto by First Class mail in their motion to dismiss (despite
6 the fact that notice was actually sent to Popular Auto) does not constitute a manifest error of law.

7 For the reasons stated above, Debtor's first argument fails to clearly establish a manifest error
8 of law nor present newly discovered evidence.

9 Debtor's second argument is that the order (Docket No. 60) granting the motion to dismiss
10 on May 29, 2009 was issued prematurely by the court. The motion to dismiss was jointly filed by the
11 Creditors on April 28, 2009 (Dockets No. 55 and 56). Debtor argues that pursuant to Fed. R. Bankr.
12 P. 9006(a) and 9006(f) he was entitled to an additional three (3) days after the thirty (30) day
13 prescribed period to respond to the motion to dismiss, since the debtor receives the certificate of
14 service (notice) by first class mail pursuant to Fed. R. Bankr. P. 9014(b) and Fed. R. Bankr. P.
15 7004(b) and 7004(g). Thus, the due date of debtor's opposition to the motion to dismiss would
16 technically fall on Monday, June 1, 2001. Creditors' in their opposition to the Motion for
17 Reconsideration acknowledge that Debtor was entitled to three (3) additional days to respond to the
18 motion to dismiss by stating the following, "However, because service was properly made by mail,
19 Fernández was entitled to an additional three (3) days to file a response, effectively extending the
20 deadline to oppose the Motion to Dismiss to June 1, 2009 (Opposition To "Debtor's Request For
21 Reconsideration Of Dismissal Pursuant to FRBP 7055(c) and FRCP 55(c)," paragraph #10). The other
22 argument Creditors' present regarding this particular issue is that it seems the court entered the order
23 dismissing the case *sua sponte*, pursuant to 11 U.S.C. §105 of the Bankruptcy Code and thus, it did
24 not have to wait the thirty (30) day period provided to respond to the motion to dismiss (Opposition
25 To "Debtor's Request For Reconsideration Of Dismissal Pursuant to FRBP 7055(c) and FRCP 55(c),"
26 paragraph #11). The court granted the dismissal of the case for the reasons stated in the motion to
27 dismiss, namely based on Debtor's lack of good faith pursuant to 11 U.S.C. §707(a) of the
28 Bankruptcy Code, not pursuant to 11 U.S.C. §105 of the Bankruptcy Code. In fact, Creditors' Motion

1 to Dismiss does not even include Section 105 of the Bankruptcy Code as a justification for granting
2 the motion to dismiss. The court granted the motion to dismiss because it established a prima facie
3 case for dismissal, and the motion was not opposed or contested. See P.R. LBR 9013-1(d) authorizing
4 action without a hearing and 11 U.S.C. § 102(1)(B)(i) of the Bankruptcy Code.

5 This court concludes that Debtor's argument has merit from a procedural and legal standpoint,
6 given that Fed. R. Bankr. P. 9006(f) states that, "[w]hen there is a right or requirement to act or
7 undertake some proceedings within a prescribed period after service and that service is by mail or
8 under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days are added after the prescribed period would
9 otherwise expire under Rule 9006(a)." Fed. R. Bankr. P. 9006(a). Also, P.R. LBR 9013-1 (h)(2)(H),
10 specifically provides for the required additional three (3) day period to respond in a motion to dismiss
11 when a party has been served by mail.¹ The court mistakenly assumed that the time to oppose the
12 motion to dismiss had lapsed at the time that the dismissal order was entered. The motion to dismiss
13 initially gave parties in interest twenty (20) days to object (Docket No. 55). The court considered said
14 notice when calculating the time to oppose. However, immediately after the motion was filed the
15 Creditors filed a corrected notice (Docket No. 56) providing for thirty (30) days to oppose, as required
16 by P.R. LBR 9013-1(h)(2)(H). The Creditors' corrected notice (Docket No. 56) failed to comply with
17 P.R. LBR 9013-1(h)(2)(H) since the same did not include the required response time language in its
18 entirety that must be included on a motion to dismiss, namely the language regarding the additional
19 three (3) days that must be granted pursuant to Fed. R. Bank. P. 9006(f) to those parties that were
20 served by mail. See P.R. LBR 9013-1(h)(2) and 9013-1(h)(1).

22 ¹Notwithstanding, the court notes that debtor's legal representative was knowledgeable
23 and was properly noticed regarding Creditors' motion to dismiss. In fact, debtor's legal
24 representative on May 26, 2009 filed a motion entitled, "Debtor's Request That Motion To
25 Dismiss Be Held In Abeyance Until Debtor's Second Request For Entry Of Discharge Forthwith
26 Is Disposed Of By This Court, or in alternative, Request For Extension Of Time To Respond &
27 Oppose" and stated the following, "Three creditors who had previously filed §523/727
28 Complaints, all of which were dismissed as untimely by this Court, have filed a joint motion to
dismiss at d.e. #55 which should be responded to on or before May 30, 2009" (Docket No. 58,
paragraph #1).

1 For the reasons stated above, Debtor's second argument in his Motion for Reconsideration
2 establishes a manifest error of law since the court erred in entering the order before the time limits
3 set forth in Fed. R. Bankr. P. 9006(f).

4 Debtor's third argument is that the court should set aside the dismissal of the case pursuant
5 to Fed. R. Civ. P. 55(c) or Fed. R. Civ. P. 60(b)(6) for excusable neglect or under the catch-all
6 provision of "any other reason that justifies relief." However, this argument is misplaced since the
7 Motion for Reconsideration was filed three (3) days after the Order Dismissing Case, and the same
8 is treated as either a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e), as previously
9 discussed herein. Furthermore, the court's order dismissing the case was based on Fed. R. Bankr. P.
10 9013, P.R. LBR 9013-1(d)(1), and 11 U.S.C. §102 of the Bankruptcy Code. Thus, said order was not
11 based on Fed. R. Bankr. P. 7055(b) nor Fed. R. Civ. P. 55(b).

12 For the reasons stated above, Debtor's third argument fails to clearly establish a manifest error
13 of law nor present newly discovered evidence.

14 Lastly, Debtor merely argues that, "[a] debtor's misconduct must be analyzed under the most
15 specific Code provisions that address that type of misconduct [section 523] and not by the general
16 provisions under section 707(a) that focuses on a debtor's compliance with the Code's procedural
17 requirements, not on the moral worthiness of a debtor." (Motion for Reconsideration, p. 11). This
18 court finds that such argument is meritless (unfounded), since the same fails to establish a manifest
19 error of law in conformity with the legal grounds presented in the motion to dismiss and also fails to
20 cite any legal source to support its argument. Also, the court notes that Debtor's opposition to the
21 motion to dismiss failed to cite any legal source to support its arguments, which were included under
22 the "Affirmative Defenses" subheading of the motion.


23 For the reasons stated above, Debtor's final argument fails to clearly establish a manifest error
24 of law nor present newly discovered evidence.

1 Conclusion

2 The Motion for Reconsideration is hereby granted as the dismissal order entered on May 29,
3 2009 was entered prematurely. Therefore, the Order Dismissing Case is vacated and set aside. A
4 pretrial hearing is scheduled for October 23, 2009 at 10:00 am.

5 SO ORDERED.

6 In San Juan, Puerto Rico, this 9th day of September 2009.

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11 ENRIQUE S. LAMOUTTE
12 U. S. Bankruptcy Judge
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CERTIFICATE OF NOTICE

District/off: 0104-3
Case: 07-05871

User: srodrigue
Form ID: pdf001

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Total Noticed: 41

Date Rcvd: Sep 10, 2009

The following entities were noticed by first class mail on Sep 12, 2009.

db +RIDEL ALEGRE FERNANDEZ ROSADO, URB VILLA NEVAREZ, 310 CALLE 32, SAN JUAN, PR 00927-4721
smg DEPARTAMENTO DE HACIENDA, PO BOX 9024140, OFICINA 424-B, SAN JUAN, PR 00902-4140
smg FEDERAL LITIGATION DEPT. OF JUSTICE, PO BOX 9020192, SAN JUAN, PR 00902-0192
smg PR DEPARTMENT OF LABOR, PRUDENCIO RIVERA MARTINEZ BLDG, 505 MUNOZ RIVERA AVENUE, 12 FLOOR, SAN JUAN, PR 00918
smg +US TRUSTEE, EDIFICIO OCHOA, 500 TANCA STREET SUITE 301, SAN JUAN, PR 00901-1938
cr +EMMA TERESA BENITEZ, ATTY. WILFREDO A. GEIGEL, 20 ANCHOR WAY, PO BOX 25749, GALLOWS BAY, U. 00824-1749
intp +JUAN BOTELLO, GALERIA BOTELLO, 208 CALLE DEL CRISTO, SAN JUAN, PR 00901-1517
cr PABLO LOPEZ BAEZ, PO BOX 194681, SAN JUAN, PR 00919-4681
cr POPULAR AUTO, ROSAMAR GARCIA FONTAN ESQ, PO BOX 362708, SAN JUAN, PR 00936-2708
2473306 AGENCIA DE COBROS TRES RIOS, 37 GONZALEZ GIUSTI 601, GUAYNABO PR 00968
2473307 +ALFREDO MARTINEZ, 8440 SW 2ND STREET, MIAMI FL 33144-2006
2473308 BANCO SANTANDER, PO BOX 362589, SAN JUAN, PR 00936-2589
2523602 +BENJAMIN GARCIA BORGES, 2202 CACIQUE ST, URB STA TERESITA, SAN JUAN PR 00913-4524
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2473310 CENTENNIAL DE PR, PO BOX 71333, SAN JUAN, PR 00936-8433
2473311 CINGULAR WIRELESS, PO BOX 192830, SAN JUAN, PR 00919-2830
2473312 DEPARTAMENTO DE ESTADO, PO BOX 9023271, SAN JUAN, PR 00902-3271
2473313 DEPARTMENT OF TREASURY, PO BOX 9024140, SAN JUAN, PR 00902-4140
2473315 +DR MANUEL ALEGRE HERNANDEZ, CALLE 42 SE 1012, RIO PIEDRAS PR 00921-2720
2473316 +DR OSIRIS DELGADO, AMERICO MIRANDA 971, SAN JUAN PR 00921-2801
2473317 DR PABLO LOPEZ BAEZ, SANTA ROSA SHOPPING MALL, SUITE 202 2DO PISO, BAYAMON PR 00956
2473318 +EMMA TERESA BENITEZ, 307 HOWARD, UNIVERSITY GARDENS, RIO PIEDRAS, PR 00927-4015
2473321 +IGNACIO VIDAL CERRA ESQ, POPULAR CENTER BLDG SUITE 1800, 208 AVE PONCE DE LEON, SAN JUAN PR 00918-1000
2473319 ++INTERNAL REVENUE SERVICE, CENTRALIZED INSOLVENCY OPERATIONS, PO BOX 21126, PHILADELPHIA PA 19114-0326
(address filed with court: INTERNAL REVENUE SERVICES, PO BOX 80110, CINCINNATI, OH 45280-0010)
2473327 +ISABEL Y LAGUARDIA, 256 CALLE ROSARIO SUITE 205, SAN JUAN PR 00912-3129
2473320 +JUAN BOTELLO, 208 DEL CRISTO, SAN JUAN, PR 00901-1517
2728601 +LEIDA RODRIGUEZ VILA, COND PASEO DE MONTE FLORES 808, CAROLINA PR 00987-7047
2473324 MARIA RECHANY, 456 PINTOR JORGE RECHANY, ESQ. BOURET, SAN JUAN, PR 00912
2473326 MARTIN CAPELLAN, URB SANTIAGO IGLESIAS, 1303 CALLE JULIO AYBAR, SAN JUAN PR 00921-4102
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2473329 ONE LINK, PO BOX 192296, SAN JUAN, PR 00919-2296
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2473332 VICTOR ORTIZ JR., CALLE 780 KM. 1.2 BO. DO?A ELENA, COMERIO, PR 00782
2473333 WALTER OTERO, SUITE 112 PMB 396, 100 GRAND BOULEVARD PASEO, SAN JUAN, PR 00926-5955
2473334 WESTERNBANK, PO BOX 1180, MAYAGUEZ, PR 00681-1180
2473323 +WILFREDO A GEIGEL ESQ, PO BOX 25749, ST CROIX VI 00824-1749

The following entities were noticed by electronic transmission.

NONE.

TOTAL: 0

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cr OSIRIS DELGADO, WILFREDO A GEIGEL ESQ, 20 ANCHOR WAY, PO BOX 25749, GALLOWS BAY ST CROIX, US VIRGIN ISLANDS

TOTALS: 2, * 0

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USPS regulations require that automation-compatible mail display the correct ZIP.

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Case: 07-05871

User: srodrigue
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Total Noticed: 41

Date Rcvd: Sep 10, 2009

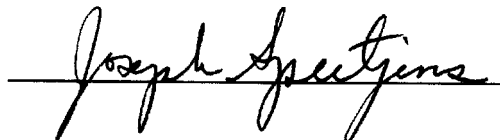
***** BYPASSED RECIPIENTS (continued) *****

I, Joseph Speetjens, declare under the penalty of perjury that I have sent the attached document to the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Sep 12, 2009

Signature:

A handwritten signature in black ink, reading "Joseph Speetjens", written over a horizontal line.